age of the bankrupt's business, was held not to pass.[10] The English courts, on the other hand, have held that an action on the case by an undertenant against his lessor for a breach of duty causing a distress by the superior landlord[11] and an action for maliciously maintaining the bankruptcy proceedings[12] vest in the trustee. And a well-considered case under the present federal act decides that an action for malicious attachment, where the damage is to the property of the bankrupt, may be maintained only by the trustee.[13]

Not only on the wording of the statute but on general principles of bankruptcy law, the later decisions seem correct. The debtor alone should sue for an injury to his personal rights. But when the direct effect of a tortious act is to diminish the estate to which his creditors are entitled to have recourse, the right of action therefor should pass to his trustee in bankruptcy. Except for the earlier American cases referred to, this principle is fully borne out by statutes and decisions. Thus, a right of action for conversion passes to the trustee.[14] One for trespass to personalty passes where the damage is to the property of the bankrupt.[15] But an action which is in form one for the infringement of a property right will not pass, if the real damage is of a personal nature, as an action for loss of services for the seduction of a member of the bankrupt's family,[16] or an action for trespass in his dwelling-house.[17] Where negligence of an attorney causes the bankrupt's imprisonment, the right of action does not pass to the trustee.[18] But it is otherwise where the attorney's negligence or fraud causes damage to the bankrupt's estate.[19] The federal courts have recognized the true distinction in decisions under both the Act of 1867 and the present act that a right of action for a penalty passes to the trustee in bankruptcy if it arises from a transaction from which the bankrupt's estate suffered.[20]

WHETHER DAMAGE TO CONTRACT RIGHT BY NEGLIGENT ACT OF THIRD PARTY IS ACTIONABLE TORT. — That the existence of a contract between two parties, in addition to giving a right *in personam*, also gives a right *in rem*[1] which the law protects from infringement has been established

[10] Noonan *v.* Orton, 34 Wis. 259.
[11] Hancock *v.* Caffyn, 8 Bing. 358.
[12] Metropolitan Bank *v.* Pooley, 10 A. C. 210.
[13] Hansen Mercantile Co. *v.* Wyman, Partridge & Co., 105 Minn. 491.
[14] Ouchterlony *v.* Gibson, 5 M. & G. 579; Lovell *v.* Hammond Co., 66 Conn. 500.
[15] See North *v.* Turner, 9 Serg. & R. (Pa.) 244, 249.
[16] Howard *v.* Crowther, 8 M. & W. 601.
[17] Rogers *v.* Spence, 13 M. & W. 571. So, also, in England, an action for trespass to personalty, where the damage consists solely or principally in personal annoyance. Brewer *v.* Dew, 11 M. & W. 625; Rose *v.* Buckett, [1901] 2 K. B. 449. But under our statute it would seem such a right of action must pass to the trustee, under the provision as to rights of action "for the unlawful taking" of the bankrupt's property. BANKRUPTCY ACT, 1898, § 70 *a* (6).
[18] Wetherell *v.* Julius, 10 C. B. 267.
[19] Wetherell *v.* Julius, *supra;* Crauford *v.* Cinnamond, Ir. R. 1 C. L. 325; *Re* Daines, 16 L. T. Rep. N. S. 127; Morgan *v.* Steble, L. R. 7 Q. B. 611.
[20] Wright *v.* First National Bank, 8 Biss. (U. S.) 243; First National Bank *v.* Lasater, 196 U. S. 115.

[1] See PIGGOTT, TORTS, 368.

by the English cases[2] and the great weight of authority in this country.[3] Whether every interference with this newly recognized right amounts to a tort, if it fulfils the conditions applicable to all other cases of torts, would seem worthy of inquiry.[4] In a recent English case, a tug was towing a ship under a contract from one port to another, when the defendant's vessel negligently collided with the ship in tow causing it to sink almost before the tug could cast loose.[5] No recovery was allowed for the loss of rights under the contract. *La Société Anonyme de Remorquage à Hélice* v. *Bennetts*, 27 T. L. R. 77 (Eng., K. B. Div., Nov. 8, 1910).

Yet if the strain of the collision had ripped up the deck planks of the tug, the owners could certainly have recovered from the negligent vessel. We therefore have the situation that though there would be a duty to use care not to injure the property of the plaintiff in the planking of the tug, there was no such duty not to injure the property of the plaintiff in the contract.[6] There is no doubt that the defendant's negligent act caused the damage. And it will readily be granted that if the defendant in this case had sunk the tow with the intention of destroying the plaintiffs' rights under the contract, an action would be maintainable.[7] The sole ground of distinction, therefore, between these two sets of facts, upon which recovery was refused in one case and would be allowed in the other, is that involving the element of responsibility,[8] *i. e.* the standard by which the defendant's acts are measured. This distinction seems unreal.

The general purpose of the law of torts is to secure indemnity to the individual who has been damaged in some right which the law recognizes should be protected, not to punish the defendant.[9] It would seem on principle that the standard of conduct which the law calls blameworthy,[10] in one who has caused damage, is, and ought to be, an external standard;[11] that, with the possible exception of those cases of so-called absolute liability,[12] that standard is measured[13] by what the conduct of a reasonably prudent man under similar circumstances would have been; and that when these two elements occur, namely, (1) damage to a right the law recognizes, caused by (2) a defendant who has failed to act up to that external standard, there is a *primâ facie* tort. It seems undesirable,

[2] Lumley *v.* Gye, 2 E. & B. 216; Temperton *v.* Russell, [1893] 1 Q. B. 715.

[3] *Accord*, Walker *v.* Cronin, 107 Mass. 555; Jones *v*, Stanly, 76 N. C. 355; Angle *v.* Chicago, etc. Ry. Co., 151 U. S. 1. *Contra*, Boyson *v.* Thorn, 98 Cal. 578; Chambers *v.* Baldwin, 91 Ky. 121; Glencoe Land, etc. Co. *v.* Hudson Bros. Commission Co., 138 Mo. 439.

[4] See PIGGOTT, TORTS, 362–368; 1 HARV. L. REV. 9–10; Raymond *v.* Yarrington, 96 Tex. 443, 451.

[5] It would not seem to be too violent an inference from the facts that the defendant knew or ought to have known that a contract for towing existed. The above analysis of the case assumes that fact, for of course if this were not so, there would be no question of negligence toward the contract right.

[6] *Accord*, Cattle *v.* Stockton Waterworks, L. R. 10 Q. B. 453.

[7] See POLLOCK, TORTS, 5 ed., 521.

[8] See 8 HARV. L. REV., 200 *et seq.*

[9] See HOLMES, COMMON LAW, 144.

[10] See *id.* 96, 107.

[11] See *id.* 110; 8 HARV. L. REV. 1.

[12] But see HOLMES, COMMON LAW, 116–117, 119, 150, 152.

[13] See *id.* 108.

in view of the general purpose of the law, to inquire into the mental attitude of the defendant in fixing a *primâ facie* liability.[14] And it is submitted that in those cases where the mental attitude of the defendant is the determining factor in fixing the ultimate liability, that factor has been considered under the further problem of what may technically be called "justification," which is determined by various considerations of public policy.[15] There can be no question of justification in the case under discussion.

Apparent and perhaps real exceptions to the principles thus briefly laid down may occur. The law has grown by slow stages, and it would be strange if it presented a uniformly logical system of principles. But this would seem the proper analysis upon which to base any future development of the law of torts.[16] Nor is lack of precise precedent [17] an argument of much weight [18] in the class of cases to which the principal case belongs.[19]

RECENT CASES.

ALIENS — NATURALIZATION ACT — PROOF OF RESIDENCE BY SUPPLEMENTARY AFFIDAVITS. — The Naturalization Act of June 29, 1906, provides that the petition of an applicant for naturalization "shall also be verified by the affidavits of at least two credible witnesses . . . who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously." The affidavits of two witnesses stated that they had personally seen the petitioner from 1904 to July, 1905. These were supplemented by the affidavits of three other witnesses who had known the petitioner four years and ten months immediately preceding the date of filing the petition. *Held*, that the requirement of the statute is satisfied. *In re Godlover*, 181 Fed. 731 (Circ. Ct., N. D. Cal.).

The former act merely provided that the five years' residence "shall be made to appear to the satisfaction of the court." U. S. REV. STAT., 1878, § 2165. The present act specifically requires the testimony of at least two witnesses. 34 U. S. STAT. AT L. 596, 598. The provision regarding affidavits is additional. The obvious purpose of these and other sections is to prevent the naturalization of aliens who have lived in this country for a lesser period than five continuous years preceding the date of the petition. And the purpose is accomplished by this construction. The language is not wholly unambiguous, and the construction put upon it in the principal case is sensible and just. Moreover, statutes regarding the rights of citizenship should be construed liberally. *In re Polsson*, 159 Fed. 283.

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[14] See *id.* 107, 130.

[15] A clear illustration can be taken from the law of defamation in respect to the defenses of truth and privilege absolute and conditional. This seems also the proper analysis of cases arising from labor and trade disputes.

[16] See the dissenting opinion of Holmes, J., in Vegehlan *v.* Guntner, 167 Mass. 92, 105–109, the dissenting opinion in Payne *v.* R. R., 13 Lea (Tenn.) 507, 528; 20 HARV. L. REV. 253.

[17] This precise point was raised and left undecided in McNary *v.* Chamberlain, 34 Conn. 384.

[18] See 14 HARV. L. REV. 193.

[19] For a full and clear analysis of the whole subject, see HOLMES, COMMON LAW, Lectures 3 and 4; 8 HARV. L. REV. 377–395.